

THE RIGHTS OF INDIGENOUS PEOPLES AND THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

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I. BACKGROUND

The protection and respect of the rights of indigenous peoples is an issue of special importance for the Inter-American Commission on Human Rights² (“Inter-American Commission”) and the Inter-American Court of Human Rights (“Inter-American Court”), the main bodies of the Inter-American human rights system.

In 1972, the Inter-American Commission held for historical reasons as well as moral and humanitarian principles, that states have a sacred responsibility to protect indigenous peoples. The Special Rapporteur on the Rights of Indigenous Peoples was created in 1990, with the goal of calling attention to indigenous peoples in the Americas who have been exposed to human rights violations, and to strengthen, promote and streamline the Inter-American Commission’s work toward the elimination of such violations.

Since the 1980s, the Inter-American Commission has systematically ruled on issues of indigenous peoples’ rights, not only through its special reports³

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2. The Inter-American Commission is an autonomous organ of the OAS. The Commission’s mandate derives from the charter of the OAS and the American Convention on Human Rights (“American Convention”). The Commission’s principal function is to promote compliance with human rights and to promote human rights in general. Other functions of the Commission include accepting, analyzing and investigating petitions alleging violations by OAS State parties of the human rights guaranteed in the American Declaration on the Rights and Duties of Man, the American Convention, and other Inter-American instruments of human rights.

3. The following are special reports from the Inter-American Commission that contain chapters related to the rights of indigenous peoples: *Justicia e Inclusión Social: Los Desafíos de la Democracia en Guatemala* (2003); *Quinto Informe sobre la Situación de los Derechos Humanos en Guatemala* (2001); *Tercer Informe sobre la Situación de los Derechos Humanos en Paraguay* (2001); *Segundo Informe sobre la Situación de los Derechos Humanos en el Perú* (2000); *Tercer Informe sobre la Situación de los Derechos Humanos en Colombia* (1999); *Informe sobre la Situación de los Derechos Humanos en México* (1998); *Informe sobre la Situación de los Derechos Humanos en Brasil* (1997);

but also through case law developed by the Inter-American Court (including decisions on admissibility, merits, mediation, subpoenas, and settlements).

In recent years, the Inter-American human rights system has increasingly developed jurisprudence directly relevant to the rights of indigenous peoples. This has been achieved through decisions recognizing not only the individual rights of members of indigenous groups, but also recognizing collective rights. Such trends are reflected, for example, in the reparations that have been used as a remedy where the victim is an indigenous group and where the remedy is of a collective nature.

Of particular relevance to the reparations issue was the “*Massacre of Plan de Sanchez*” (Guatemala) decision on the merits of the Inter-American Court, April 29, 2004, judgment on reparations, November 19, 2004. In this case, the Inter-American Commission argued before the Inter-American Court that the massacre of July 18, 1982 had been perpetrated as part of a genocidal policy by the state, with the intent of destroying, totally or partially, a Mayan indigenous population. In paragraph 51 of its merits judgment, the Court noted that it only had the authority in contested matters to find violations of the American Convention on Human Rights and other Inter-American human rights instruments that conferred such jurisdiction. Nevertheless, the Court stated that these types of state actions, which gravely affected the identity and values of the Mayan-Achí people, and were perpetrated through a pattern of massacres which compromised the international responsibilities of the state, could be taken into account when reaching a decision relating to reparations.⁴

The Inter-American Commission, in addition to requesting reparations for the surviving victims of the massacre and their families, also petitioned for collective reparations. According to the Commission,

only through the collective perspective, based on an understanding of the socio-cultural elements characteristic of Mayan groups such as their spiritual beliefs and communal social structure, and the acknowledgement of the magnitude of the genocidal acts committed against this specific group, can the required reparations be determined in order to eliminate the effects of the violations carried out by the State.⁵

Informe Sobre la Situación de los Derechos Humanos en Ecuador (1997); *Segundo Informe sobre la Situación de los Derechos Humanos en Colombia* (1993); *Cuarto Informe sobre la Situación de los Derechos Humanos en Guatemala* (1993); *Segundo Informe sobre la Situación de los Derechos Humanos en Suriname* (1985).

4. Case of La Masacre de Plan de Sánchez v. Guatemala, Inter-Am. Ct. of H.R., Judgment of Apr. 29, 2004, Ser. C No. 105.

5. Case of La Masacre de Plan de Sánchez v. Guatemala, Inter-Am. Ct. of H.R., Decision on reparations, Nov. 19, 2004, para. 90.a (quoting and citing the Inter-American Commission on Human Rights) [hereinafter *la Masacre de Plan de Sánchez reparations decision*].

In its judgment on reparations, the Inter-American Court stated, “[g]iven the fact that the victims in this case belong to the Mayan-Achí people, this Tribunal considers that a significant component of the remedy should be reparations to the communities as a whole.” The Court added, “reparations are not granted as exclusive indemnity for material and immaterial damages, because other forms of damages may require additional forms of reparation.”⁶

In this section, the Tribunal will determine the measures required to repair non-material damages that have no pecuniary scope, as well as measures to remedy conditions for the public at large. These types of measures are of special relevance in this case because of the extreme gravity of the facts and the collective character of the harm caused.⁷

It is important to note that the Inter-American Court, in the judgment on reparations, also took into account special considerations regarding the importance of the preservation of the culture, communal structure, and modes of self-governance of the Mayan-Achí people.

The Inter-American Court determined that because of the death of women and elders, the oral transmitters of Mayan-Achí culture, significant knowledge was lost to future generations, thus creating a cultural vacuum. Orphaned children did not receive the traditional heritage of their ancestors. In turn, the militarization and repression endured by the survivors of the massacre, especially the youth, resulted in a loss of faith in the traditions and knowledge of their forbearers.⁸

The Court stated that, as a consequence of the massacre, the Mayan-Achí communal structure has been displaced by a hierarchical, militaristic structure, as the traditional Mayan authorities were replaced by military commissioners and Civil Defense Patrol (Patrullas de Auto-defensa Civil: PAC) chiefs. The leaders who survived the massacre were unable to fulfill their roles within their community due to the repression they were subjected to by the military. The will of the community, based on the consensus of its members, as well as on Mayan norms and values for respect and service, was eliminated. In its place, authoritarian practices were introduced. The imposition of this military structure and the arbitrary use of power have affected communal life in the Plan de Sanchez community, as it has led to the decomposition of the traditional group structure and the group’s self-identification.⁹

The Court observes that the victims in the present case, members of the indigenous Mayan population of the Achí linguistic group, possess traditional authorities and distinct forms of self-government centered on the principles of collective agreement and mutual respect. The group has its own social, economic

6. *Id.* para. 86.

7. *Id.* para. 93.

8. *Id.* para. 49.12.

9. *Id.* para. 49.16.

and cultural structures. For the members of these communities, harmony with their environment is expressed through the spiritual relationship with the land, their management of resources, and their profound respect for nature. Their traditions, rituals and practices play an essential role in their communal life. Their spirituality is reflected in the strong relationship between the living and the dead, and is expressed through the community's use of burial rituals as a way of establishing permanent contact and solidarity with their ancestors. The transmission of knowledge and culture is a function assigned to elders and women.¹⁰

II. PROPERTY RIGHTS AND INDIGENOUS PEOPLES

The main bodies of the Inter-American human rights system have expressed the necessity of ensuring special protection for the rights of indigenous peoples to their land, because the effective enjoyment of this land implies not only the need to protect the land as an economic unit, but also to protect the human rights of a collective community that bases its economic, cultural and social development on its relationship with its land. "From the human rights perspective on personal property, a small plot of corn deserves the same respect as a bank account or a modern factory."¹¹

The Inter-American Commission and the Inter-American Court have developed an evolving interpretation of the international human rights instruments that deal with indigenous peoples and the rights to their lands.

An example of this is the decision reached in the case involving the *Mayagna de Awas Tingni* Community. In this case, the Inter-American Court held that Article 21 of the American Convention protects the right to property in a way that encompasses, among other things, the rights of the members of indigenous communities to hold communal property.¹²

In this case, the Inter-American Court expressed that, given the characteristics of the case, it was necessary to clarify the concept of indigenous peoples' property rights. In regards to the issue of communal property, the Court

10. La Masacre de Plan de Sánchez reparations decision, *supra* note 5, para. 85.

11. *Report on the Situation of Human Rights in Guatemala*, Inter-Am. Comm'n H.R. (1993).

12. Through an evolving interpretation of the international mechanisms available for the protection of human rights, taking into account the applicable interpretative norms, and in conformity with Article 29.b of the Convention—which prohibits a restrictive interpretation of rights - this court considers that Article 21 of the Convention protects the right to property in a manner that includes, among other things, the rights of members of indigenous peoples in terms of communal property. The right to communal property is also recognized in Nicaragua's Constitution. Case of Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua, Inter-Am. Ct. H.R., Judgment of Aug. 31, 2001. Ser. C No. 79, para. 148.

indicated that there is an established tradition of communal land ownership among indigenous peoples that does not place land ownership in the hands of any one individual but in the individual's community. Similarly, the Court held that the deep relationship between indigenous peoples and their land needs to be recognized and understood. The Court stated: "Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival."¹³

In addition, the court held that indigenous peoples must be able to fully enjoy their lands in order to preserve their cultural and spiritual legacy and to transmit that legacy to future generations, since the relationship between indigenous peoples and their land is not exclusively centered on possession and production.¹⁴

Regarding the official recognition of the property rights of lands held by indigenous peoples, the Inter-American Court established that possession of land should be sufficient to trigger the recognition of property rights, given indigenous peoples' customary right to hold communal property.¹⁵

On September 6, 2002, the Inter-American Court, through the system of provisional measures and at the request of the petitioners in the case of the *Mayagna de Awas Tingni*, called on the State to adopt the necessary measures to protect the use and enjoyment of the lands belonging to this community, with the participation of the petitioners in the planning and implementation of such measures. The Court decided:

1. To order the State to adopt, without delay, whatever measures are necessary to protect the use and enjoyment of property of lands belonging to the Mayagna Awas Tingni Community, and of natural resources existing on those lands, specifically those measures geared toward avoiding immediate and irreparable damage resulting from activities of third parties who have established themselves inside the territory of the Community or who exploit the natural resources that exist within it, until the

13. *Id.* para. 149.

14. "For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations." *Id.*

15. "Indigenous peoples' customary law must be especially taken into account for the purpose of this analysis. As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration." *Id.* para. 151.

definitive delimitation, demarcation and titling ordered by the Court are carried out.

2. To order the State to allow the applicants to participate in planning and implementation of those measures and, in general, to keep them informed of progress regarding measures ordered by the Inter-American Court of Human Rights.

3. To order the State to investigate the facts set forth in the claim that gave rise to the current measures, so as to discover and punish those responsible.¹⁶

In the case involving the Mayan Indigenous Communities from the Toledo District,¹⁷ decided on October 12, 2004, the Inter-American Commission concluded the following:

The State has violated the property rights guaranteed in Article XXIII of the American Declaration, to the detriment of the Mayan community, by failing to adopt effective measures recognizing the right to communal land ownership of lands that have been traditionally occupied by these indigenous peoples, as well as by failing to delineate and establish titles by other means, and by failing to implement the required mechanisms to clarify and protect the legal status of the lands on which these indigenous peoples are entitled to exercise their rights.

The State also violated the right to property guaranteed in Article XXIII of the American Declaration, to the detriment of the Mayan people and in the absence of their informed consent, by granting logging and oil concessions to third parties for the exploitation of resources located within lands that should have been delineated and titled, or protected by other means.

The State violated the right to equal protection under the law and the right to non-discrimination, guaranteed in Article II of the American Declaration, to the detriment of the Mayan people, when the State failed to grant the required protections to exercise property rights fully and fairly with other members of the population in Belize.

The State violated the right to judicial protection, guaranteed in Article XVIII of the American Declaration, to the detriment of the Mayan people, due to inefficient judicial proceedings, unreasonable delay, and the denial of effective access to the courts for the protection of their fundamental rights.

As a result, the Commission recommended that the State of Belize:

1. Adopt in its domestic law, and through fully informed consultations with the Maya people, the legislative,

16. Case of *la Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua*, Inter-Am. Ct. H.R., Provisionary Measures of Sept. 6, 2002.

17. Report No. 40/04, Case 12.053, Merits, *Mayan Indigenous Communities from the Toledo District, Belize*, Oct. 12, 2004.

administrative, and any other measures necessary to delimit, demarcate and title or otherwise clarify and protect the territory in which the Maya people have a communal property right, in accordance with their customary land use practices, and without detriment to other indigenous communities.

2. Carry out the measures to delimit, demarcate and title or otherwise clarify and protect the corresponding lands of the Maya people without detriment to other indigenous communities and, until those measures have been carried out, abstain from any acts that might lead the agents of the State, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area occupied and used by the Maya people.

3. Repair the environmental damage caused by the logging concessions granted by the state over territory traditionally occupied and used by the Maya people.¹⁸

On October 13, 2004, the Inter-American Commission found admissible the case related to the Kichwa de Sarayaku indigenous group.¹⁹ The petitioners argued that the state of Ecuador was responsible for a series of acts and omissions that harmed the Kichwas by allowing an oil company to undertake activities in ancestral Kichwa lands without the consent of the indigenous peoples, to persecute Kichwa leaders, and by denying judicial protection to the community. In response, the State argued that the petition was inadmissible because the petitioners had failed to exhaust the available domestic remedies, emphasizing that petitioners had filed a habeas corpus petition instead of an administrative challenge to the alleged infraction by the state.

In the report on admissibility, the Inter-American Commission rejected the claim that domestic legal resources had not been exhausted, and concluded that it had competence to review the claims brought by petitioners regarding the alleged violation of articles 4, 5, 7, 8, 12, 13, 16, 19, 21, 23, 24, 25, and 26, in accord with articles 1(1) and 2 of the American Convention. The Commission found the petition admissible under the guidelines established by articles 46 and 47 of the American Convention.

Notably, the Inter-American Commission requested on May 5, 2003 the immediate adoption of precautionary measures required to avoid any irreparable damages to the members of the Ecuadoran Kichwa group, based on the strong relationship between the cultural survival of indigenous peoples and their lands.²⁰

18. *Id.*

19. Inter-Am. Comm'n. H.R., Report No. 62/04, Petition 167/03, Admissibility Decision, Pueblo Indígena Kichwa de Sarayaku y sus Miembros, Ecuador, Oct. 13, 2004.

20. Case of Pueblo Indígena de Sarayaku, Inter-Am. Ct. of H.R., Resolution from July 6, 2004.

To this end, the Inter-American Commission requested that Ecuador adopt all measures required to ensure the life and physical security, as well as the psychological and moral well-being, of all the members of the Kichwa group, with special consideration given to Franco Viteri, José Gualinga, Francisco Santi, Cristina Gualinga, Reinaldo Alejandro Gualinga, and girls who could fall subject to intimidation, threats, or harassment by military or civilian groups who do not belong to their community. Furthermore, the Commission requested that the State investigate the events that took place on January 26, 2003 in the Campamento de Paz y Vida Tiutihuali of the community of Sarayaku; that it prosecute and sanction those responsible; that it adopt the measures necessary to protect the special relationship of the community in Sarayaku with its lands; and that it implement the precautionary measures after first consulting with the indigenous community and their representatives before the Inter-American system.

Because the Inter-American Commission concluded that the precautionary measures that it ordered had not been fulfilled by the State, on June 15, 2004, the Commission requested the Inter-American Court to adopt provisional measures in favor of the Sarayaku Kichwa group, calling on the State to implement without delay all measures required to:

1. Protect the life and personal integrity of the members of the Sarayaku Kichwa group, as well as their representatives;
2. Abstain from illegally curtailing the right to freedom of movement of the members of the Sarayaku Kichwa community;
3. Investigate the transgressions against members of the Sarayaku community; and
4. Protect the special relationship of the Sarayaku Kichwa community with its ancestral lands, especially protecting the use and enjoyment of communal property and of the existing natural resources in those lands. The state should also adopt the measures required to avoid immediate and irreparable harm caused by activities of third parties who enter the land to exploit natural resources. These measures shall be implemented until the Inter-American Court of Human Rights adopts a final decision on the issue.²¹

On July 6, 2004, the Inter-American Court granted the provisional measures and requested that the state adopt, without delay, the necessary measures to protect the life and personal integrity of the members of the affected indigenous communities, with the aim of guaranteeing their freedom of movement, and to investigate the facts that made the provisional measures necessary, identifying those responsible and imposing the appropriate sanctions.

21. *Id.* (paraphrased from the original Spanish).

Currently, the Inter-American Commission is hearing a case dealing with the effects on the population of environmental contamination resulting from mining activities. On October 15, 2004, the Inter-American Commission found admissible a case entitled “Community of San Mateo Huanchor and its Members,”²² in which the petitioners hold the Republic of Peru responsible for the violation of their fundamental individual and collective rights. The petitioners, who are members of the Community of San Mateo de Huanchor, allege that they have suffered harm due to environmental contamination produced by the presence of a toxic landfill located close to their community. In response, the state argued that the claim was inadmissible because domestic remedies had not yet been exhausted, given that the petition was filed before the Commission while a criminal case was still pending in Peru.

The Inter-American Commission rejected the argument that domestic remedies had not yet been exhausted and declared the petition admissible in relation to the alleged violation to the right to life, personal integrity, judicial guarantees, and the protection of family, children, property, and economic, social and cultural rights guaranteed in articles 4, 5, 8, 17, 21, 25 and 36 of the American Convention, in accordance with article 1(1) and 2 of the same instrument.

It should also be noted that in the case of *Mary and Carrie Dann*, the Inter-American Commission held that the American Declaration of the Rights and Duties of Man must be interpreted by taking into consideration relevant principles of international human rights law that relate to the individual and collective rights of indigenous peoples. On this issue, the Court stated the following:

[I]n addressing complaints of violations of the American Declaration it is necessary for the Commission to consider those complaints in the context of the evolving rules and principles of human rights law in the Americas and in the international community more broadly, as reflected in treaties, custom and other sources of international law. Consistent with this approach, in determining the claims currently before it, the Commission considers that this broader corpus of international law includes the developing norms and principles governing the human rights of indigenous peoples. As the following analysis indicates, these norms and principles encompass distinct human rights considerations relating to the ownership, use and occupation by indigenous communities of their traditional lands.²³

22. Inter-Am. Comm’n. H.R., Report No. 69/04, Petition 504/03, decision of admissibility, Comunidad de San Mateo De Huanchor y sus Miembros, Peru, Oct. 15, 2004.

23. Case of *Mary and Carrie Dann v. United States*, Inter-Am. Comm’n. H.R., Report No. 75/02, Dec. 27 2002, para. 124.

Based upon the foregoing analysis, the Commission is of the view that the provisions of the American Declaration should be interpreted and applied in the context of indigenous petitioners with due regard to the particular principles of international human rights law governing the individual and collective interests of indigenous peoples.²⁴ Particularly pertinent provisions of the Declaration in this respect include Article II (the right to equality under the law), Article XVIII (the right to a fair trial), and Article XXIII (the right to property). As outlined above, this approach includes special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation. The Commission wishes to emphasize that by interpreting the American Declaration so as to safeguard the integrity, livelihood, and culture of indigenous peoples through the effective protection of their individual and collective human rights, the Commission is respecting the very purposes underlying the Declaration which, as expressed in its Preamble, include recognition that “[s]ince culture is the highest social and historical expression of that spiritual development, it is the duty of man to preserve, practice and foster culture by every means within his power.”²⁵

III. THE DRAFT INTER-AMERICAN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Since its beginning, the Inter-American Commission has supported the drafting of the Draft Inter-American Declaration on the Rights of Indigenous Peoples. In 1989 the General Assembly of the OAS requested that the Inter-American Commission draft a legal instrument relating to the rights of indigenous “populations.” The Commission undertook this task and conducted a series of national and regional consultations with indigenous organizations, experts, and governments. In 1997, after several years of work, the Commission approved the “Draft Inter-American Declaration on the Rights of Indigenous Peoples” and presented this document to the General Assembly of the OAS.

In order to analyze and discuss the draft promulgated by the Inter-American Commission, a “Working Group to Prepare the Draft American

24. *Id.*, para. 101.

25. *Id.* para. 131.

Declaration on the Rights of Indigenous Peoples” was formed, composed of representatives from States who are members of the OAS.

The special sessions of the Working Group commenced in 1999, with the participation of representatives from indigenous communities and/or experts. In the April session of 2001 the participation of indigenous peoples’ representatives in the discussions was solidified. In this same session, the Working Group, following the interventions and proposals of various member states and indigenous peoples’ representatives, decided to substitute the term “peoples” for “populations,” both in the text of the draft and in the name of the working group.

The participation of indigenous peoples’ representatives has continued to deepen, as evidenced by the special sessions conducted by the Working Group in 2002, and in the negotiation sessions of November 2003 and January and April 2004. Highly relevant issues have been discussed in the sessions, such as the concepts of “peoples,” “self-determination,” and “land, territories and natural resources,” with the participation of both state delegations and indigenous peoples’ representatives.

Although there are still issues to be resolved, the participation of indigenous peoples’ representatives in special sessions and negotiations constitutes an innovative step in the structure of the OAS. Additionally, this type of participation clearly facilitates the search for consensus between OAS member states and the beneficiaries of the project under discussion.

The Inter-American Commission, through the Special Rapporteur on the Rights of Indigenous Peoples, has consistently collaborated in this process with the objective of supporting the Working Group. Such support has been geared toward the promotion of human rights and the effective and permanent participation of indigenous peoples’ in this process.

